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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. ~~1395~~ 104

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellants,*
v.
UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal From the United States District Court for the Western District of Pennsylvania.

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

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APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission have filed a joint Motion to Affirm, and Erie-Lackawanna Railroad Company, intervening appellee, has filed a separate Motion to Affirm the judgment of the district court. This brief is directed to both motions.

ARGUMENT

Appellants argued to the Court below that the Commission erred as a matter of law in failing to make any findings on the vital issue of the effect of Erie-Lackawanna's reduced rates on the rail revenues and reasonable rate structure. The court below rejected Appellants' arguments by reaching the completely erroneous conclusion that the Commission *had* in fact made a specific finding on this critical issue, namely, a finding that Erie-Lackawanna's rates would have such a limited effect that Apellants would not be required to reduce their rates (J.S. 13a).

Appellees have not attempted to defend this important error of the court below. Instead, the United States and the Interstate Commerce Commission argue (Motion, p. 4) that the Commission "gave close consideration to the probable effects of the new rates."

On the pages (J.S. 18a to 26a) of the Commission's report cited in support of that statement there appears a mere recitation of the opposing contentions of the parties including,

(1) The contradictory position of Erie-Lackawanna that it was ready to join in publishing the same reduced rates from Appellants' docks at Cleveland and other Lake Erie Ports to the involved and other destinations,* and;

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*The emphasis put on the alleged disabilities of the Erie Dock completely overlooked the additional fact that the Erie-Lackawanna's reduced rates apply also from the Cleveland Docks of each of three steel companies, i.e., those of Jones & Laughlin Steel Corporation, Republic Steel Corporation, and Youngstown Steel Corporation (Tr. 156). No disabilities are asserted or found with reference to those docks.

Argument.

(2) Erie-Lackawanna's "hopes" of securing additional traffic under the reduced rates were predicated on an assumption that the other carriers would not reduce their rates (J.S. 20a).

This hardly constitutes "close consideration" to the probable effects of the reduced rates, not to mention a finding on that highly material issue.

The Commission's report shows clearly that the ultimate conclusion that the rates were not unlawful as being unreasonably low or as a destructive competitive practice (J.S. 28a) was based not on any consideration or findings of the effect of the new rates, but on a conclusion of law (J.S. 28a):

> "Despite alleged destructive competitive practices, it has been held in a number of proceedings that where a rate is compensatory, there is no basis for a finding that it contravenes the national transportation policy. [Citing Cases] The same principle was enunciated by the court in *Cooper-Jarett, Inc., v. United States,* 226 F. Supp. 318, 325, affirmed *per curiam,* 379 U.S. 6 (1964). A similar finding is warranted in this proceeding."

In so holding, the Commission put into discard a forty-year history of rail intramodal statute and case law summarized in Appellants' Jurisdictional Statement at pages 9 to 11.

Appellees, United States and Interstate Commerce Commission, argue (pages 4 and 5 of the Motion) that the Commission properly declined to attach "controlling importance" to the possible effect of Erie-Lackawanna's rates on Appellants' rates; that Erie-Lackawanna's action was a reasonable "defensive" competitive response and that a mere possibility of reduced

rates by appellants was not enough to establish destructive competition.*

The short answer to this argument is that the Commission did not base its decision on the conclusion or arguments which Appellees' counsel now advance. All the Commission did, in appraising Erie-Lackawanna's proposal, was to recite the opposing views as to the effect of Erie-Lackawanna's action, and then make the equivocal statement (J.S. 28a):

> "By its new rates, the respondent hopes to increase its participation in the iron ore traffic and thereby gain, not lose, revenues. In view of the physical limitations on the amount of ore it can handle, respondent predicts that protestants will not have to reduce their rates to become competitive. If the other rail carriers counter with a corresponding reduction, it may be that respondent's proposal will fail in its purpose. But in the circumstances here presented, we cannot conclude that those rates constitute a destructive competitive practice."

The action of the Commission must be judged solely on the basis stated in the report, not on *post hoc* rationalization by counsel. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947);

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*The Government (p. 4), and the Erie-Lackawanna (p. 4) emphasize that the Commission found the rates to be within the "zone of reasonableness", but the Commission ascertained the bottom limit of the zone only with reference to the fact that the rates were compensatory. It completely overlooked the fact that a rate may be unreasonable — below the zone of reasonableness — if it will probably have the effect of breaking down a reasonable rate structure and dissipate carrier revenues; *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589, 610-11 (1922); *New York v. U.S.*, 331 U.S. 284, 344-45 (1947)

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 169 (1962).

The Commission's decision is of the same character as that criticized by this Court in *Chicago, Milwaukee, St. P. & P. R. Co. v. United States,* 294 U.S. 499, 510, 511 (1935):

> "In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

The motions of the Appellees and Intervening Appellee, Erie-Lackawanna, agree that §15a(3) of the Interstate Commerce Act (49 U.S.C. §15a(3)) governing intermodal competition cannot be applied to this case of intramodal competition. The Government's contention (Motion, p. 5), and that of Erie-Lackawanna (Motion, p. 6) that the Commission did not apply the standards of §15a(3) are accompanied by no analysis of the Commission's action which give rise to this issue and no attempt, beyond a brush-off, to answer Appellants' argument with respect thereto. The Government says that the section was not "relied upon by the Commission, albeit the Commission did cite some cases decided under that section for the light they might throw on the meaning of 'destructive competitive practices' — an undefined term in the National Transportation Policy".

The Commission did not merely "cite" some §15a(3) cases. It referred *only* to §15a(3) cases — eight of them — and it relied upon them. The holding of those cases is that if a rate is compensatory, under the provisions of §15a(3), it may not be found to constitute a destructive competitive practice (with narrow exceptions)

because it will adversely affect the traffic and revenues of carriers of a different mode. Hence, the Commission's line of reasoning was that the factors set forth in §15a(2), which applies only to railroads, are "related" to those set forth in the National Transportation Policy and will be considered along with the contention that the Erie-Lackawanna rates constitute a destructive competitive practice prohibited by the National Transportation Policy (J.S. 27a); then for the meaning of the phrase "destructive competitive practice" the Commission turned to cases which, being controlled by §15a(3), held that if a challenged rate is compensatory it does not constitute a destructive competitive practice because it adversely affects the rates and revenues of a competing mode; finally, on the basis of these §15a(3) cases it concluded that "where a rate is compensatory, there is no basis for a finding that it contravenes the National Transportation Policy." (J.S. 28a)*

Having applied the rule of the inapplicable §15a(3) decisions rather than the applicable and different principles stated in intramodal statute and case law under §1 and §15a(2) of the Act, (49 U.S.C. §1 and §15a(2)), the Commission has erred as a matter of law. The plain language of §15a(3) prohibits the Commission

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*The lower court sought to excuse this by saying that the Commission's statement that where a rate is compensatory there is no basis for a finding that it contravenes the National Transportation Policy must be read in the light of the fact that the Commission had already found that Appellants would not be required to meet the Erie-Lackawanna's reduction. This was a clear and unquestioned error (see p. 2 *supra*).

from considering the effect of rate reductions by *one mode* of transportation on the traffic or rate structure of *another mode,* with narrow exceptions of the type indicated in *Missouri Pac. R. Co. v. United States,* 203 F. Supp. 629, 634 (E.D. No. 1962) and *Interstate Commerce Commission v. New York, N. H. & H. R. Co.,* 372 U.S. 744, 763 (1963). These prohibitions of §15a(3) have no application in this intramodal competitive rate case and the Commission erred in not following its own intramodal competitive decisions (discussed at pp. 9 and 10 of the Jurisdictional Statement) and those of the Courts, including *Youngstown Sheet & Tube Co. v. U. S.,* 295 U.S. 476 (1935); *U.S. v. Chicago, M. St. P. & P. R. Co.* 294 U.S. 499, 506 (1935); *U.S. v. Illinois Central R. Co.,* 263 U.S. 515, 525 (1924); *New York v. U. S.,* 331 U.S. 284, 345 (1947); and *Jefferson Island Salt Mining Co. v. U.S.,* 6 F. 2d 315, 318 (D. Ohio 1925)*

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*In *New York v. U.S.,* the Court said, 331 U.S. at 345:

> "In *Youngstown Sheet & Tube Co. v. United States, supra,* the Commission, acting under §15(1), increased rail rates by prescribing what it found to be reasonable minimum rates. There was no finding that the existing, lower rates were not compensatory. The finding of reasonableness was premised on the grounds that 'lower rates would create undue discrimination against shippers in origin districts who cannot use the water-rail route, and would tend to disrupt the rate structure, and to destroy the proper differentials between various producing districts on shipments to Ohio destinations.' P. 479. The Commission relied not only on evidence bearing upon the character of the service and cost but also on a comparison of other rates in the same or adjacent territory. The Court sus-

Argument.

The special importance of this case is that if the Interstate Commerce Commission is permitted to decide competitive rate contests between railroads in reliance upon cases controlled by §15a(3), the application of which is limited to proceedings "involving competition between carriers of different modes of transportation", then it will have succeeded in changing the law and, in so doing, to achieve precisely that result which Congress declined to sanction when the Commission expressly requested that the change be made. (J.S. 8)

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tained the order saying, 'The existing rate structure furnished support for the finding of reasonableness.' "

Chicago, Milwaukee, St. P. & P. R. Co. v. United States, supra, recognized the power of the Commission to declare a rate unreasonable because it threatened a reasonable rate structure and entailed a consequent substantial impairment of revenue, but the Court interfered with the Commission's use of the power in that case because of the lack of findings that the apparently unjust rate structure was, in fact, reasonable.

CONCLUSION

The Motions to Affirm should be denied and the case should be set down for plenary consideration on the merits.

Respectfully submitted,

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Dated: June 16, 1966

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